IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL FIRST APPEAL No. 71 of 1987

UNION OF INDIA & ANR.
V/S
M/S. DHARIWAL & CO. & ORS.

Mr. MS SINGHVI & Mr. RAJAT DAVE, for the appellant.

Mr. RR NAGORI, for the respondents.

Date of Order : 8.8.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

REPORTABLE

This appeal has been filed by the defendant, against the impugned judgment and decree of the learned District Judge, Bikaner, dt. 22.4.1987, decreeing the plaintiffs' suit for Rs. 19,229.49, along with interest from the date of suit, being 19.1.1982, till recovery, along with cost.

Facts of the case are, that the plaintiffs, being a partnership firm, and the partners of the firm, filed a suit against the defendants, alleging interalia, that the plaintiff no. 1 is a registered partnership firm, while the plaintiffs no. 2 to 5 are its partners. According to the plaintiff, the defendant no.3 supplied certain goods to the plaintiff, pursuant to the order of the plaintiff, and the said goods were sent to the plaintiff by being booked with

the Railway Administration vide Railway Receipt No. 14833 Invoice No. 15 dt. 24/26.1.1981, from Mithapur to Bikaner, freight amounting to Rs. 2627/- was to be paid by the consignee. The goods were to be delivered by the Railway Administration being defendant no. 1 and 2. The defendant no.3 sent the documents, and the railway receipt to the plaintiff through State Bank of India, whereupon the plaintiff paid Rs. 30,462.16 paisa, being price of 200 bags of Soda Ash, and Rs. 2099.13 paisa, being the price of packing material, and the railway receipt was got released. Then, on production of the railway receipt with the railway, it was informed that the goods have not been received. When a longer time elapsed, the plaintiff wrote a letter to Divisional Commercial Superintendent (Claims), and lodged his claim, that too to no good, whereupon on 26.5.1981 the plaintiff got served a notice under Section 80 C.P.C., read with Section 78 of the Indian Railways Act, 1890, hereafter referred to as 'the Act'. It is thereafter only, that on 12.6.1981, the railway authorities of the Goods Shed Bikaner delivered only 84 bags of Soda Ash to the plaintiff, thereupon the plaintiff vide letter dt. 4.7.1981 laid a claim for the price of shortage of the goods amounting to Rs. 20,674.82 paisa, mentioning therein that 16 bags had torn away, therefore, delivery thereof was not taken, though on being told by plaintiff, the defendant provided new bags, but then it lost its efficacy, and loss of quality of the goods was assessed at 30%. Thus,

deducting the price of the goods in damaged condition, the amount of Rs. 18,381.56 were said to be payable to the plaintiff. However, the plaintiff, adding the cost of 30% of the goods having been damaged, and the cost of bags, laid the claim for Rs. 19,229.49 paisa. Then, claiming interest for different amounts, for different period, a total claim of Rs. 23,899.49 paisa was lodged, which was denied, and thereupon the suit was filed, claiming the decree for Rs. 23,899.49, paisa along with interest at the rate of 20.5%.

The defendant no. 1 and 2 filed a joint written statement, denying the firm to be registered, and other plaintiffs to be the partners, for want of knowledge. The allegation of the defendant no.3 having received the price of the goods was denied. Then, sending of the goods by defendant no.3, vide receipt no. 148331 on 24/26.1.1981, from Mithapur to Bikaner, through railway, and the fare amounting to Rs. 2627/- to be paid by the consignee, was not disputed. The price of the total goods being Rs. 32561.29/- was denied. Then the allegation about the plaintiff's writing the letters to the Divisional Commercial Supdt. was denied being vague. However receipt of notice of the Advocate was admitted. It was admitted that 84 bags were delivered. However, the loss of efficacy, or quality of 16 bags, was denied, assessment of loss at the rate of 30% by supervisor was admitted, however, the

claim was denied. In additional pleas, it was interalia pleaded, that the plaintiff has claimed some of the amounts twice over, that the other Railway, on whose account the goods were damaged, had not been impleaded, in whose absence the suit cannot be maintained, the train, wherein the goods were loaded, met with an accident in between Okha Mandi and Kuranga Station by getting derailed, and some carriages were run over by other carriages, which accident was an act of nature, and is not attributable to any negligence of the railway authority, therefore, the plaintiffs are not entitled to claim any damages. It was also pleaded, that out of 200 bags, only 100 bags were received, rest were damaged in the accident, therefore, the plaintiffs are not entitled to cost of those bags. Interalia with these pleadings, it was contended that the suit be dismissed.

The learned trial court framed as many as six issues. First issue was as to whether the plaintiff no.1 is a registered partnership firm, and the other plaintiffs are its partners. Issue no.2 related to the question as to whether the plaintiff paid a sum of Rs. 32,561.29 to State Bank of India, Bikaner to be paid to the defendant no.3, and thereby the plaintiff became owner of the goods consigned. Then, issue no. 3 related about the question as to whether the plaintiff is entitled to Rs. 23,899.48 paisa along with interest. Issue no. 4 was as to whether no cause

of action accrues to the plaintiffs against the defendants no. 1 and 2. Then, issue no. 5 was about maintainability of the suit in view of the pleadings taken in para-21, 22, 23, and 26 of the written statement. Then, issue no. 6 related to relief only.

These paras 21, 22, 23, and 26 of the written statement comprehended the objections about effect of non impleadment of other officers of the railway administration, the plaintiffs being not entitled to any compensation, as the damage caused was on account of derailment of railway carriage, being an act of God, and unforeseen risks, and about the plaintiff being not entitled to maintain the suit, as the plaintiffs were neither consignor, nor consignee, and the person making endorsement was not a person authorised by the consignor.

The plaintiff produced four witnesses in its evidence while the defendants examined 11 witnesses. The plaintiff along with the plaint produced duplicate copy of the certificate from the office of the Registrar of Firms, Rajasthan, being Ex.1, about the plaintiff firm being registered under the Partnership Act. However, since the plaintiff did not produce the list of partners, to show, that the names of other plaintiffs were entered in the register of Firms, as partners of the firm, during trial the plaintiff filed an application under O. 13 Rule 2

C.P.C., on 23.8.1986 along with affidavit, seeking to produce the copy of the relevant entry of the register. This application was replied by the defendant. However, on 9.1.1987, the plaintiff chose to get the application dismissed, as not pressed. Accordingly the documents were not taken on record. Then on 10.4.1987, the defendants no. 1 and 2 filed an application, to the effect, that the documents filed by the plaintiff be not returned to the plaintiff. As this application was filed before the date of hearing, already fixed, it was ordered to be put up on 15.4.1987. On 15.4.1987 the lawyers did not appear on account of strike, and even on the next date, being 22.4.1987 also, none of the lawyer appeared, and therefore, that application for not returning the documents to the plaintiff was dismissed.

After completing the trial, the learned trial court decreed the suit as above. Deciding issue no.1, it was interalia held, that the defendants have not specifically denied the averments of the plaintiff, about the plaintiff no. 1 being a registered partnership firm, and the other plaintiffs being the partners of the firm, and since the plaintiffs have produced the registration certificate, and have deposed about the other plaintiffs being partners of the firm, in view of the judgment of Hon'ble the Supreme Court in Jahuri Sah Vs. Dwarika Prasad Jhunjhunwala, reported in AIR 1967 SC-109, and from the

evidence led on the side of the plaintiff, it was found, that it is established, that the firm is registered and the other plaintiffs were the partners, and therefore the bar of Section 69(2) no more comes in the plaintiffs' way. Reliance was also placed on the judgment of Andhra Pradesh High Court, in M.J. Velu Mudaliar Vs. Sri Venkateshwara Finance Corpn., reported in AIR 1971 A.P.-63. Then, the judgment of Madras High Court, in N.A. Munavar Hussain Sahib Vs. E.R. Narayanan, reported in AIR 1984 Mad.-47, was relied upon to hold, that the plea based on the provisions of Section 69 having not been raised in the written statement, cannot be allowed to be raised at a later stage. Then, apart from finding the plaintiffs to have proved the firm to be registered, and other plaintiffs to be partners, it was also considered, that since the defendant Railways are common carrier, they are under obligation under the Indian Carriers Act to reach the goods to destination safely, and within a reasonable time, and if the goods get damaged, or get destroyed, is required to compensate as a tortuous liability, for enforcement of which, the bar of Section 69(2) is not attracted, as the claim is not a claim arising from the contract, between the firm and the defendants. In this regard reliance was placed on the judgment in, Sm.Umarani Sen Vs. Sudhir Kumar Datta, reported in AIR 1984 Calcutta-230. Thus, issue no. 1 was decided in favour of the plaintiff.

Regarding issue no.2, after appreciating the evidence, comprising of the plaintiff's own statement, and of the various authorities of the Bank, and the various documents of the Bank, as were produced, and proved, it was found, that the consignor had sent the papers through the Bank, which documents were presented to the State Bank of India through Bank of Baroda, where the payment was made, and thus the plaintiffs became the owners of the goods. Thus, issue no. 2 was also decided in favour of the plaintiff. Deciding issue no.3, relating to quantum of compensation, it was found, that the plaintiffs have been able to establish the loss caused to them, to be to the extent of 19,229.49. However, in view of the judgment of Hon'ble the Supreme Court, in Mahabir Prasad Rungta Vs. Durga Datta, reported in AIR 1961 SC-990, it was found, that the plaintiffs are not entitled to interest prior to the date of the suit. Then, deciding issue no. 4 it was found, that all the Railways belong to the Union of India, and when the goods are entrusted to common carrier, the suit can be filed at the destination place also, and since the defendants did not settle the claim of the plaintiff, the plaintiff is entitled to maintain the suit. Thus, issue no. 4 was decided in favour of the plaintiffs. Deciding issue no.5, being a crucial issue, after appreciating the evidence led on the side of the defendant, about the cause of happening of accident, including the report of enquiry, and the findings recorded therein, it was considered, that

Ultra Sonic Testing was not undertaken, and it is not established, that the railway track was examined, as no certificate about checking of the track, said to have been done on 15 and 16.1.1981, and 29.1.1981, have been produced on record, and that since replacement of the rails was going on, it required greater care and attention. It was also found, that the rails were having cracks, which increased by and by, resulting into breakage of rail, resulting into accident, which was on account of want of proper maintenance of the railway track. Thus, the railway was found liable to pay compensation for the damages suffered by the plaintiff. It was also found, that the goods were booked on 24/26.1.1981, the accident occurred on 30.1.1981, while the goods were not removed from the site of the accident till 21.5.1981, and thus the goods, being Soda Ash, got damaged by moisture, and the railway authorities did not take requisite care and caution, even in minimising the loss. Then, also considering the provisions of Section 76 of the Indian Railways Act, it was held, that the defendants have failed to show any satisfactory reason, as to why goods were not rescued from the place of accident for about 3 months and 21 days. Likewise, even after collecting the goods from the accident site, the delivery was not given to the plaintiff till after three weeks, while the delivery was to be effected within a period of seven days from the date of booking. Then, it was found, that the loss occurred to the

plaintiffs was, on account of negligence of the railway authorities. Thus, this issue was also decided against the railway authorities. In view of the above findings the plaintiffs' suit was decreed.

Arguing the appeal it was contended, firstly, that the learned trial court was in error in deciding issue no.1, as it is not established on record that the plaintiff firm is registered partnership firm, and unless it is so registered, the suit is not maintainable. The other submission made is, that the accident was an act of God, as it happened on account of some fault in the railway track, and therefore, in view of the provisions of Section 74(3) of the Act, the Railways are not liable. It was also contended, that the learned trial court has applied double standards, inasmuch as, on the one hand adverse inference has been drawn against the defendants for non production of certificate, as against which, no interference was drawn against the plaintiff for non production of relevant entry of the register of the Firms. The next argument made was, that in absence of the railway administration, with whom the goods were booked, being arrayed as party defendant, the suit cannot be maintained, against the destination railway authorities only, and the same is, therefore, not maintainable, and the suit has been wrongly decreed.

Elaborating the argument, it was contended, that

Section 69(2) of the Partnership Act enacts two fold requirements; the first being, about the firm being registered, and the second being, about the plaintiffs being required to be shown as partners in the register of the Firms. In the present case, though Ex. 1 establishes first requirement, but the second requirement is missing. It was contended that the constitution of the firm was changed w.e.f 1.4.1980, notice whereof was given to the Registrar on 20.8.1986, while the present suit had been filed on 19.1.1982 itself, i.e. even before sending notice of change to the Registrar of Firms, as required to by Section 63 of the Partnership Act. As such, it cannot be said, that as on the date of the filing of the suit, the names of the plaintiffs, other than the firm, were entered in the register of Firms as partners, and therefore, the suit could not be maintained. Reliance in this regard was placed on the judgment, in M/s Shreeram Finance Corporation Vs. Yasin Khan, reported in AIR 1989 SC-1769. The other submission made in this regard was, that irrespective of the fact, as to whatever was the pleadings in the written statement, since the issue had been framed, it was required to be proved by the plaintiff, and the learned trial court was in error in finding the fact to have been proved by the plaintiffs by oral evidence, inasmuch as, it is settled law, that the fact, about the names of the plaintiffs being shown as partners in the register, can be proved only by production of copy of the entry in the register, and by no

other evidence, rather the other evidence is not even admissible. It was also contended, that since it is legal bar, even taking of pleading in this regard in written statement is not necessary. Reliance was also placed on the judgment of this Court, in M/s Sohan Lal Basant Kumar Vs. Umrao Mal Chopra, reported in 1985 RLR-997, specially para-44 and 46, and on another judgment of this Court, in M/s.Chandrabhan Bansilal Ramratan Das, Bikaner Vs. The Municipal Council, Bikaner, reported in 1974 WLN-133. Then elaborating other submissions, it was contended, that since more than two railway administrations are involved in the transportation of goods, suit against destination Railway administration alone could not be maintained without impleading other railway administration. It may be observed that no legal authority was cited to substantiate this contention. Then it was also submitted, that there is no privity of contract between the plaintiff, and the defendant railways, as the plaintiffs are neither consignor, nor consignee, therefore, the suit is not maintainable. In this regard also no legal authority was cited to substantiate the contention. Then, it was contended, that the accident was not the result of negligence or fault of the railway administration, but was an act of God, plain and simple. On the face of language of Section 74, read with Section 76 of the act, since in the present case the goods were booked on owner's risk rate of freight, no claim can be laid against the railways, except

upon proof, that such loss, destruction, damage deterioration or non delivery was due to "negligence or misconduct" on the part of the railway administration, or of any of its servants. Since in the present case, in the entire plaint, there is not even a pleading, much less has it been established, that such loss, destruction, damage deterioration or non delivery was due to "negligence or misconduct" on the part of the railway administration, or of any of its servants, the plaintiff could not be held liable for any amount. It was also contended, that in deciding the suit, the learned trial court has not acted in proper manner, inasmuch as, even though the counsels of both the sides were not present, still the suit has been decided, and even the application filed by the appellant, for not returning the documents, filed by the plaintiff, under O. 13 Rule 2 C.P.C., which application was not pressed, had also been decided, and has been dismissed. A contention was also sought to be raised, to the effect, that the learned trial court has not framed issue no. 5 in an appropriate manner, inasmuch as, in view of the language of Section 74 of the Act, it is for the plaintiff to prove, that the accident was on account of negligence or misconduct on the part of the railway administration or any of its servant. Thus, burden of proving this issue was wrongly placed on the defendant, and therefore, since the plaintiff has not led any evidence, in view of the provisions of Section 74(3) of the Act, the suit was

required to be dismissed.

On the other hand, learned counsel for the respondent supported the impugned judgment. Placing reliance on the judgment of Hon'ble the Supreme Court, in Jahuri Sah's case, it was contended, that since there was no specific denial on the side of the defendant, about the plaintiff no.1, not being registered partnership firm, and the other plaintiffs being shown as partners in the certificate issued by Registrar of Firms, showing them to be partners, and therefore, the learned trial court has rightly appreciated the evidence of the plaintiff, and found it to have been proved, that the firm is registered, and the other plaintiffs are shown to be partners of the firm. Then, an alternative submission was made, that for the sake of argument even if it is assumed, that the plaintiff has failed to prove to be registered partnership firm, and has also failed to prove, that the other plaintiffs are shown to be partners in the register, still the bar of Section 69(2) is not attracted, for the simple reason, that for attracting the bar of Section 69(2), not only the suit should have been filed on behalf of the firm, but suit should be for enforcement of 'right arising from a contract', while in the present case the suit is not for enforcement of any of the 'right arising from contract', but is a suit for claiming damages for tortuous liability of the defendant, and the liability arises under the Indian

Carriers Act, being a common law duty of the carrier, and that the learned trial court has rightly found this aspect in favour of the plaintiff, by relying upon the judgment of Hon'ble Calcutta High Court, in Umarani's case. Reliance was also placed on the judgment of Hon'ble the Supreme Court, in M/s Haldiram Bhujiawala Vs. M/s. Anand Kumar Deepak Kumar, reported in AIR 2000 SC-1287. Then, reference to the provisions of Section 80(b) of the Act was made, and it was submitted, that it is not necessary for the plaintiff to implead all the railway administration, other than the destination railway. Then regarding right of the plaintiff to maintain the suit, despite not being shown as consignor, or consignee, in railway receipt, reliance was placed on the judgment of Allahabad High Court, in Dominion of India Vs. Messrs Gaya Pershad Gopal Narain reported in AIR 1956 Allahabad 338, and that of the judgment of Hon'ble the Supreme Court, in The Union of India Vs. Ishwarnand Saraswat, reported in AIR 1966 SC-395. Then, it was lastly contended, that the appellant has failed to establish, that the accident was not on account of negligence or misconduct on the part of the railway administration. It was the duty of the defendant to show, as to what maintenance was required in respect of the track, as well as carriages, in order to avoid accidents, and to prove it, to have been undertaken. On the other hand, rather from the defendant's evidence it is clear, that the track was having cracks, which cracks aggravated, and resulted into breakage of

railway line, and the accident occurred. Thus, it is clear, that the defendant had not taken due care and caution to avoid accident, which by itself amounts to negligence. That apart, even after happening of the accident, no steps were taken by the railway to mitigate the damages, inasmuch as the goods were allowed to remain lying at the accident site for good long period of practically four months, exposing them to the vagaries of weather, and therefore, on the plaintiff proving the quantum of damages suffered by him, he is entitled to be granted decree for the said amount, and in the present case, the plaintiff has satisfactorily established the quantum, and therefore, no interference is required to be made in the impugned decree.

I have considered the submissions, and have closely gone through the record, the relevant provisions of law, and various judgments cited at the bar.

At the outset it may be observed, that so far as the quantum of damages, said to have been suffered, as has been assessed by the learned trial court is concerned, it has not been challenged on the side of the appellant, inasmuch as no submissions were made in that regard. Therefore, I need not detain on that.

Then taking up the contention about maintainability of the suit without impleading the other

railway administration as party defendant, in my view, apart from the fact, that as noticed above, no legal authority was pointed out by the learned counsel for the appellant to substantiate the contention, the contention stands sufficiently answered by the express provisions of Section 80(b) of the Act, which reads as under:-

> "(b)if the passenger was, or the animals or goods were, booked through over the railway of two or more railway administrations, against the railway administration from which the passenger obtained his pass or purchased his ticket or to which the animals or goods were delivered for carriage, as the case may be, or against the railway administration on whose railway the destination station lies, or the loss, injury, destruction, damage or deterioration occurred;.."

A perusal of the above language does show, that it clearly prescribes and confers right on the plaintiff to file suit on any one or more of the railway administration, in cases where the goods are to be transported through more than one railway administration.

Then, I take up the contention about the plaintiff's right to file a suit, despite not being consignor or consignee. In this regard, on factual aspects, from perusal of the judgment of learned trial court, and from reading of the statement of the witnesses produced by the plaintiff, including P.W.2 Ratanlal, and P.W.3 C.C. Malu, and that of the plaintiff Jhanwarlal, read with the documents, including Ex. 2 to 6, and Ex. 17, it is clearly

established, that the plaintiff had paid the price of the goods, to the consignor, and had thereby acquired the ownership of the goods. What is significant to note is, that to this entire evidence of the plaintiff, there is no rebuttal whatever, even worth the name. Even during course of arguments, this factual aspect was not contested, by contending that the title in the goods did not pass to the plaintiff. In that view of the matter, I am at one with the finding of the learned trial court, recorded on issue no.2, about the plaintiffs having become owner of the goods by having paid the price, and that being the position, in my view, the plaintiffs were clearly entitled to maintain the present suit. Learned counsel for the respondent has rightly placed reliance on the judgments, in Gaya Prashad's case, and Ishwarnand's case. In Ishwarnand's case, of course, the suits were filed for damages to the goods against the railway, and those suits were decreed upto the High Court, and before Hon'ble the Supreme Court the contention was raised by the railway, to the effect, that the factory being consignor could not maintain the suit, as consignee only could maintain the suit, and Hon'ble the Supreme Court observed in para-10 as under:-

> "Ordinarily it is the consignor who can sue if there is damage to the consignment, for the contract of carriage is between the consignor and the railway administration. Where the property in the goods carried has passed from the consignor to some one else, that other person may be able to sue.."

It was further observed as under:-

> "Whether title to goods has passed from the consignor to the consignee will depend upon the facts of each case and so we have to look at the evidence produced in this case to decide whether in the case of five consignments booked to the J.C. Mills, the title to the goods had passed to the Mills before the fire broke out on March 8, 1943."

In that case it was found by the learned courts below, that the title to goods had not passed to J.C. Mill till that date, and it was still with the consignor. Thereafter Hon'ble the Supreme Court affirmed the concurrent findings recorded by the two learned courts below, and decree was upheld. Thus, the principle propounded in Ishwarnand's case is, that out of the consignor and consignee, or any body else for that matter, it is the person, in whom title to the goods rests, is entitled to maintain the suit, in case of damage to the goods, while they are with the railway authority in transit. Likewise in Gaya Prasad's case, the full Bench of the Allahabad High Court was referred the precise question, as to whether the consignee, who is not the owner of the goods, but to whom the goods are consigned for the purpose of sale on commission basis, is entitled to maintain a suit for loss, in respect of damage caused to the goods in transit. In that case, four different persons booked wagons of oranges, each of them consigned it to the plaintiff, the plaintiff took delivery, and found the goods to be

deteriorated, and thus refused to take delivery of the other three wagons, and took delivery of one wagon only. Thereupon the consignee filed suit, and the contention raised before the Full Bench was, that the commission agent does not suffer any loss by reason of deterioration of the goods, and therefore, he cannot sue, while the plaintiff's contention was, that he was holder of the title, and was entitled to receive delivery of goods, therefore, he had sufficient interest in the goods, to sue for the damages. Considering this controversy, it was held, that it is well established in India, that not only can parties to a contract sue upon it, but also persons who are entitled to a benefit under it, or to whom the rights created by it have been transferred. Then, referring to the judgment of Privy Council in Mercantile Bank of India Ltd. Vs. Central Bank of India Ltd. reported in AIR 1938 P.C.-52 wherein the person in whose favour the railway receipt was endorsed was held to be the consignee. Then, referring to various other judgments, it was ultimately held in para-26 that if the goods have deteriorated to such an extent that delivery cannot be properly made, their equivalent, which is their cash value, must be delivered to the consignee, and it is the consignee, who can enforce payment of this cash value, which is, after all what the suit for damages is. Thus, in view of the above two judgments, I have no hesitation in holding, that the consignee is entitled to maintain the present suit, in view of his having proved to have acquired

title in the goods, by making payment of the price thereof to the consignor, through Bank.

I may now take up the contention raised about the manner in deciding the suit, i.e. dismissing the application filed by the defendant on 10.4.1987, for not returning the document to the plaintiff, and then deciding the suit. In this regard it may be observed, that the sequence of things is, that on 23.8.1986 the plaintiff filed an application under O. 13 Rule 2 CPC, seeking to produce copy of the entry of register of firms. This application was opposed, by filing a reply on 9.10.1986, and that application was dismissed by the learned trial court, vide order dt. 2.1.1987, as on that date it was not pressed by the plaintiff. Thereafter the defendant filed the above application on 10.4.1987, praying that the document be not returned to the plaintiff, and since by then the case was already fixed on 15.4.1987, the application was taken up on that day, on which date since nobody appeared as the lawyers were on strike, the case was adjourned to 22.4.1987, on which date again the strike continued, and the learned trial court considered the case on merits, and observed regarding application, that as and when it is found necessary, appropriate orders will be passed on the application. However, that very day the judgment was given, and the application was dismissed. In my view, in the totality of circumstances, this dismissal

of the application, has no bearing whatever, on the decision of the case on merits. Even at the cost of repetition it may be observed, that by the application under O. 13 Rule 2, the plaintiff sought to produce certified copy of the list of partners, obtained from the Registrar of Firms, and that application was got dismissed as not pressed; obviously, with the result, that the document was not taken on record. In the application dt. 10.4.1987, it was not the case of the defendant, that the defendant wants to produce the document on record, or instead of returning it to the plaintiffs the defendant wants to tender it in evidence, so as to make it a part of the record. In that view of the matter, even if the document is returned to the plaintiff, or is not returned, it hardly has any bearing, on the merits of the case. Admittedly in passing the impugned judgment, the learned trial court has not considered that document in favour of the plaintiff. Therefore, this objection does not help the appellant, in any manner whatever, and is accordingly turned down.

I now come to the objection raised about improper framing of issue no. 5. The objection is on the anvil of Section 74, read with Section 76 of the Act. According to which, in the event of goods being booked on owner's risk rate, no claim can be laid against the railway, except upon proof, that such loss, destruction, damage, deterioration

or non delivery was due to “negligence or misconduct on the part of the railway administration or any of its servants”. The contention is two fold, firstly, that it was for the plaintiff to prove this fact positively, and therefore, the burden of issue was required to cast on the plaintiff, instead of it, the learned trial court has cast the burden on the defendant, and since the plaintiff has not led any evidence, to show, that such loss, destruction, damage, deterioration or non delivery was due to “negligence or misconduct on the part of the railway administration or any of its servants”, the suit could not be decreed.

True it is, that the burden of issue no. 5 was required to be cast on the plaintiff. True it also is, that there is no positive evidence on the side of the plaintiff to show, that the goods were damaged on account of negligence or misconduct on the part of the railway administration or any of its servants. The fact also does remain, that notwithstanding all this, the defendant did lead evidence, rather the substantial part of voluminous evidence, led on the part of the defendant is, on this aspect only. It could be understood, that notwithstanding wrong placing of burden, relying upon Section 74(3), the defendant would have stood better advised, not to lead any evidence on this aspect. In that event, the argument might have been available to the appellant, that in absence of any evidence on the side of the plaintiff in this regard,

the suit could not be decreed, but here the things are, that the defendant has led evidence. In that view of the matter, wrong placing of the burden, has not occasioned any prejudice to the defendant, and now the evidence, as has come on record, is only required to be appreciated, in the background, that the plaintiffs have not led any evidence in this regard, which obviously results into the consequences, that the evidence led by the defendant remains un-rebutted. Then, coming to the evidence led on this aspect; it is not in dispute, that the goods were booked on owner's risk rates. It is also not in dispute, that in such circumstances, the railways are liable for loss, destruction, damage, deterioration or non delivery, only if it is due to "negligence or misconduct on the part of the railway administration or any of its servants". The question, therefore is, as to whether from the material on record, the negligence or misconduct of the railway authorities is established, or not? In this regard it may be observed, that it is not in dispute, on the side of the defendants, that the train, in which the goods in question were carried, did meet with an accident, between the stations Okha Mandi and Kuranga, as a result of the accident, there was derailment, and the goods were damaged, and lost. According to the defendant, consequent upon derailment, the various carriages ran over the other, and out of the goods of the present consignee, 102 bags were carried to Kuranga, and for that purpose, since the wagon

could not be lifted, a crane was commissioned. By accident the goods got damped and deteriorated. According to the defendants, accident occurred on 30.1.1981, and the goods were removed from the site on 21.5.1981. The reason for this delay has been deposed by D.W.2 to be non availability of crane, and he has deposed, that he cannot give any reason as to why crane could not be commissioned earlier. In that view of the matter, the thing required to be seen is, as to whether there was any negligence or misconduct on the part of the railway administration, on account of which the accident occurred. According to D.W.6, who was the President of the Enquiry Commission, which was appointed to enquire about the causes of accident, the accident occurred on account of internal defect in the railway track, and rail line was found bent, and one line was found to be broken, he has also deposed, that on inspection of broken line, it revealed, that the breakage of line occurred on account of internal defect in the line. He has also deposed, that the internal defect went on increasing, by and by, and ultimately the line broke down. He has also deposed, that ultra sonic testing is undertaken for detecting such internal defects, and on the tracks where fast speed trains run. In cross examination he has deposed, that at the time of enquiry the record was seen, and therefrom it was revealed, that the track was checked on 16.1.1981, and thereafter on 29.1.1981. He has admitted, that the railway line got detached from the sleepers and

got bent. In this sequence, though the defendants have tried to produce witness to impress upon the court, that the track was inspected, but then, in my view, to say the least, there is no evidence, even by word of mouth, by the person, who may have actually checked the track, before the accident, inasmuch as D.W.7 and 8 are the persons, who had checked the carriages (coaches). Then, D.W.9 Kunj Bihari has deposed, that the line was under his charge, and that the trains were passing on the track. He has also deposed that after accident he had inspected the line, and cannot say, as to why the accident occurred. Then, he has deposed that the regular checking of the track is undertaken by the Key man, and he cannot say as to who was the key man on checking, on that day. Thereafter he has categorically deposed, that he did not go for checking before derailment. Thus this witness is of no significance, rather is of no consequence. Then, D.W.10 is the Assistant Station Master, who obviously does not depose about the inspection of the track. Then, D.W.11 is the Guard on duty, who obviously has no duty to check the track. This is coupled with the fact, that any record of the inspection of the track has not been produced.

Thus the net result is, that the defendant has not led any evidence, even worth the name, to show, that on that day, or soon before the train was put on the track, the track was inspected, and that, it was found free from

defects.

Ordinarily the railway track is not supposed to break down. In this background, it is to be seen, as to whether, the accident is attributable to the negligence or misconduct, on the part of the railway authorities. On the aspect of requirement of proof, about maintenance, on the part of the railway authorities, I may refer to and rely upon the judgment of Hon’ble the Supreme Court, in Minu B. Mehta Vs. Balkrishna Ramachandra Nayan, reported in 1977 A.C.J.-118(SC), wherein it was held, that in order to sustain a plea, that the accident was due to mechanical defect, the owner must raise a plea, that the defect was latent, and not discoverable by the use of reasonable care, and the owner is not liable. In that case Hon'ble the Supreme Court referred to a decision of the House of Lords, in Henderson Vs. Henry E. Jenkins and Sons, reported in 1970 A.C.J.-198 (H.L. England), in which case, the lorry driver applied the brakes of the lorry on a steep hill, but they failed to operate, as a result, the lorry struck and killed a man, who was emerging from a parked vehicle. The defense was about brake failure due to a latent defect not discoverable by reasonable care on driver's part. On facts it was found by the House of Lords, that the lorry was five years old, and had done at least, 1,50,000/- miles, the brakes were hydraulically operated, and that brake failure was due to a steel pipe bursting due to corrosion from 7mm

to 1mm, the corrosion had occurred where it could not be seen, except by removing the pipe completely from the vehicle, and this had never been done. Expert evidence showed, that it was not a normal precaution to do this if, as was the case, the visible parts of the pipe were not corroded. The corrosion was unusual and unexplained. Then, expert witness has deposed, that it must have been due to chemical action of some kind, such as exposure to salt from the roads in winter, or on journeys near the sea. On this material the House of Lords held, that the burden of proof, which lay on the defendants (owner), to show, that they had taken all reasonable care had been discharged, still the defect remained undiscovered. Relying upon that principle Hon'ble the Supreme Court held, that in that given case, all that was pleaded was, that axle brake ring of the lorry came out, and the driver lost control of the vehicle and that, the defect can be developed in a running vehicle resulting in the driver losing control of the steering wheel, though it was stated that all precautions were taken to keep the lorry in a road worthy condition, it was found, that it was not specifically pleaded, that the defect, i.e. axle brake ring, coming out, is a latent defect, and could not have been discovered by the use of reasonable care. Thus, on account of lack of plea, as well as the lack of evidence, the defense set up was rejected. I may then refer to the judgment of Madras High Court, in Perumal Vs. G. Ellusamy Reddiar, reported in 1974 A.C.J.-182(Madras),

wherein the Tribunal found, that the accident was a result of mechanical defect, and not due to any negligence or rashness, and the High Court held, that the coming off of the left front wheel, was not due to the impact itself, but because of the stub axle nuts breaking or slipping, all of a sudden. Then, it was held, that the respondent cannot escape liability, by merely showing, that the accident was a result of mechanical defect, and that, the defect could not be detected, he should further show, that he took reasonable care to avoid such mechanical defect, and that the defect could not be detected, in spite of exercise of a reasonable care. It was also held, that in the case of mechanical breakdown, unless the defendant satisfies the Court, that he arranged periodical check up, and carried out necessary repairs, regularly, and that, he did everything in his power, to eliminate mechanical unsoundness, the breakdown would be only a neutral factor, and not a valid defense. Likewise in Muniammal Vs. G. Mohan, reported in 1975 A.C.J.-81 (Madras), the accident was pleaded to be on account of sudden brake failure, and it was held, that one would expect the lorry owner to have examined some automobile engineer, who had previously inspected the internal parts of the lorry, or the engineer who had replaced the internal parts, if they had been found to be worn out. In that case the vehicle was 19 years old, and the questions posed were, what did the lorry owner do during these 19 years, did he get the internal brake

cylinder inspected or replaced at any time by any engineer, did he ever have the lorry serviced and kept in good repair? And as these questions remained unanswered, the defense was negatived. This principle has been followed by various other High Courts consistently.

Thus, may be, that on the face of the provisions of Section 74(3), it is required to be proved positively by the plaintiff, that the accident was on account of misconduct or negligence on the part of the railway, but then, the expression negligence only means, failure to take requisite care and caution, which results in damages to the plaintiff, and the extent of requisite care and caution varies from case to case, and depends upon facts and circumstances of each case. Putting up the defense of mechanical brake down tantamounts to contending that there was no negligence on the part of the owner, i.e. the owner had taken all requisite care and caution to ensure, that the accident does not take place. In that sequence, if the question is viewed on the principles propounded in the above cases, it is to be seen, as to whether the appellant has shown to have taken all requisite care and caution to maintain the track free from dangers, and the answer, in my view, obviously is in the negative, as D.W.6 has deposed, that internal defect in the line did increase by and by, and ultimately resulted into breakage of the line, and has further admitted, that ultra sonic test is a device to find

out such internal defects. Thus, it is admitted position, that there is device available with the defendants, even to detect the defects, like the one, which is alleged to have existed in the present case, and since no evidence has been led, as to when the track was last checked, and found to be OK, and also, in view of the fact, that admittedly the ultra sonic test was not undertaken on the track, it cannot be said, that the breakage of railway line is not attributable to the negligence or misconduct on the part of railway administration. Learned trial court has discussed this aspect, and has appreciated the evidence, thread bare, in paras-12, 13 and 14, and in my view, has rightly found, the issue against the defendants, so far as it relates to the defense raised by the defendants in para-22 and 23 of the written statement.

At this place I may deal with the contention raised by the learned counsel for the appellant, about the learned trial court having applied double standards. Suffice it to say, that record of inspection of the track was relevant, in the circumstances of the present case, more particularly as, there is no witness produced on the side of the defendant, who may have himself inspected the track before accident, and had found it to be OK. Had any such witness been produced, the question might have been about the reliability or quality of that witness, in absence of any oral evidence whatever, the best documentary

evidence, which admittedly was available with the defendant at least, should have been produced, and it cannot be said, that in expecting the documentary evidence, the learned trial court applied double standards.

Thus, in my view, the learned trial court has rightly found, that the accident was out come of negligence, on the part of the railway authorities.

Now, I take up the contention raised on the anvil of Section 69 of the Partnership Act, about maintainability of the suit filed by the plaintiffs. To start with, I may gainfully reproduce the provisions of Section 69 of the Partnership Act, as such, which read as under:-

> "**69. Effect of non-registration.**-(1) No suit to enforce a right, arising from a contract or conferred by this Act, shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
>
> (2) No suit to enforce a right, arising from a contract, shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not effect-
>
> (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to

realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This Section shall not apply-

(a) to firm or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in the areas to which, by notification under Section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which in the Presidency Towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency Towns, is not of a kind specified in the second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

As noticed above, the contention of the learned counsel is, that the firm should not only be registered, the persons suing as partners should be shown in the register of firms, as partners in the firm, and that this fact could be proved, only by production of copy of entry in the register, as no other evidence is admissible. While in the present case, the plaintiff has not only not produced the copy of the entry in the register, rather even the application filed under O. 13 Rule 2 CPC was got dismissed as not pressed. It was also sought to be pointed out, that some of the plaintiffs were subsequently inducted in the partnership, even notice whereof was not given to

the Registrar, before filing of the suit, and therefore, in view of the judgment of Hon'ble the Supreme Court, in Shreeram Finance Corporation's case, the suit cannot be maintained. On the other hand the contention of the respondent is, that firstly there is no plea in the written statement, and secondly the bar of Section 69(2) is not attracted, because for attracting the bar thereof the suit should be for enforcement of "right arising from a contract". While in the present case the suit is for damages, arising from tortuous liability of the defendant, and the liability is under Carriers Act, being a common law liability, and therefore the suit is not barred, and reliance has been placed on the judgment in Umarani's case and Haldiram Bhujiawala's case.

I have considered the submissions. So far the principle propounded in Shreeram Finance Corporation's case is concerned, there is no dispute about the legal proposition. Likewise learned counsel rightly relied upon Division Bench judgment of this Court, in M/s.Sohan Lal Basant Kumar's case, wherein in para-46 it was held as under:-

> "It is also clear that no oral evidence can be taken for the purpose of deciding as to who were the partners of the plaintiff firm at the time of the institution of the suit and the names of the persons suing must be shown in the Register of Firms as partners of the plaintiff firm at the time of the institution of the suit, as the suit in the name of the firm is virtually a suit by all the partners of the firm and in order to

> prove the fact as to who were the partners of the plaintiff firm at the time of the institution of the suit, the only evidence admissible is a certified copy of the relevant entry in the Register of Firms. Thus, the only possible interpretation to be placed on the expression 'are or have been' shown in the Register of Firms, could be the persons suing must either be presently shown in the Register of Firms as partners of the firm at the time of the institution of the suit..."
>
> (*Emphasis supplied*)

However, a look at the judgment of the learned trial court shows, that it has proceeded to rely upon the judgment of Calcutta High Court, in Umarani's case. In this judgment the Division Bench of Calcutta High Court was concerned with a suit for damages filed by unregistered partnership firm against a carrier. It was found by the learned lower Appellate Court, that the plaintiffs were members of the unregistered partnership firm, who made over the goods to the defendant no.1 for carriage by truck, and deliver at the plaintiff's branch office at Raigunj, and 16 packages were not delivered on the ground that they were stolen from the truck of defendant no.1, while seven bales were found damaged by water. In those facts it was found that the goods in question were to be transported to destination, and the transporter was common carrier, who is a liability in tort.

I may now refer to a later judgment of Hon'ble the Supreme Court, in M/s. Raptakos Brett & Co. Ltd. Vs. Ganesh Property, reported in AIR 1998 SC-3085. In this case the

plaintiff land lord was an unregistered partnership firm, who had leased the property to the defendant, and had filed the suit for recovery of possession, after efflux of lease. The question was raised about the entitlement of the plaintiff to file the suit, and Hon'ble the Supreme Court in para-22 considered the scope of applicability of bar of Section 69(2), and held, that it is a penal provision, which deprives the plaintiff of its right to get its case examined on merits by the Court, and simultaneously deprives the Court of its jurisdiction to adjudicate on the merits of the controversy between the parties. It will, therefore, have to be strictly construed. It was also observed, that it is also true, that once on such construction of this provision, the bar under Section 69(2) of the Act gets attracted, then the logical corollary will be, that the said provision being mandatory in nature, would make the suit incompetent on the very threshold. Then reference was made to various judgments of other High Courts, and then in para-23 it was found, that one part of cause of action, referring to the breach of the covenant on the part of the defendant, when it failed to deliver vacant possession to the plaintiff lessor on the expiry of the lease, and thus being the guilty of breach of covenant, was obviously hit by the provisions of Section 69(2). But then, the other part of the cause of action, based on the statutory obligation of the defendant lessee, when it failed to comply with its statutory obligation under

Section 108(q) read with Section 111(a) of the Property Act, and this cannot certainly be said, that it is arising out of the erstwhile contract, and then, in para-24 it was held, that in view of the provisions of Section 108(q) and Section 4 of the Property Act, and certain provisions of the Contract Act, it was concluded, that there was no locus poenitentiae given to the tenant to continue to remain in possession after the determination of lease by efflux of time, on the basis of any such contrary express term in the lease. Consequently, it is the legal obligation flowing from Section 108(q) of the Act, which would get squarely attracted on the facts of the present case, and then it was held as under:-

> "once the suit is also for enforcement of such a legal right under the law of the land available to the landlord it cannot be said that enforcement of such right arises out of any of the express terms of the contract which would in turn get visited by the bar of Section 69, sub-section (2) of the Partnership Act. Consequently it has to be held that when paragraph 2 of the plaint in addition made a reference to right of the plaintiff to get possession under the law of the land, the plaintiff was seeking enforcement of its legal right to possession against the erstwhile lessee flowing from the provisions of Section 108(q) read with Section 111(a) of the Property Act which in turn also sought to enforce the corresponding statutory obligation of the defendant under the very same statutory provisions. So far as this part of the cause of Action is concerned it stands completely outside the sweep of Section 69, sub-section (2) of the Partnership Act. The net result of this discussion is that the present suit can be said to be partly barred by Section 69, sub-section (2) so far as it sought to enforce the obligation of the defendant under Clauses 14 and 17 of the contract of lease read with the

> relevant recitals in this connection as found in paragraph 2 of the plaint. But it was partly not barred by Section 69, sub-section (2) in so far as the plaintiff based a part of its cause of Action also on the law of the land, namely, Transfer of Property Act whereunder the plaintiff had sought to enforce its statutory right under Section 108(q) read with Section 111 (a) of the Property Act. Enforcement of that right had nothing to do with the earlier contract which had stood determined by efflux of time. The first point for determination therefore, has accordingly, to be held partly in favour of the plaintiff and partly in favour of the defendant. As the decree for possession is passed on the basis of both parts of causes of Action, even if it is not supportable on the first part, it will remain well sustained on the second part of the very same cause of Action."

Thus, the principle propounded in this judgment is, that apart from the two requirements about the firm being required to be registered, and the persons suing as plaintiffs to be shown in the register of firms as partners in the firm, the more important requirement for attracting this expression is, that the suit should be with respect to the enforcement of the right "arising from a contract", as contra distinguished from a right arising from law. This judgment in M/s. Raptakos Brett's case has been followed by Hon'ble the Supreme Court, in Haldiram Bhujiawala's, relied upon by the learned counsel for the respondent. In that case the suit was for enforcement of a right flowing from the Trade Marks Act, and the distinction was drawn from the stipulations of the dissolution deed, whereby certain stipulations were agreed upon regarding use of the name, and it was held in para-10, that a suit for perpetual

injunction to restrain the defendant not to pass-off the defendant's goods as those of the plaintiffs by using the plaintiffs' trade mark, and for damages, is an action at common law, and is not barred by Section 69(2). Then, in para-11 it was also held, that if the reliefs of permanent injunction or damages are being claimed on the basis of a registered trade mark, and its infringement, the suit is to be treated as one based on a statutory right under the Trade Marks Act, and is, in our view, not barred by Section 69(2).

Therefore, the sine qua non for attracting the bar of Section 69(2) is, that the suit should be for enforcement of a right "**arising from a contract**". In the present case, even from a reading of the plaint, apart from other material on record, it is clear, that the damages are not claimed by way of enforcement of right "arising from contract", rather damages are claimed for the tortuous liability of the defendant, as common carrier, which is a common law liability, and as such, the bar of Section 69(2) is not at all attracted. Obviously, therefore, I need not go into the aspects about the names of the other plaintiffs being, shown in the register of firms as partners of the firm, at the time of institution of the suit, or not.

Thus, the upshot of the aforesaid discussion is that the appeal has no force, and is dismissed. The parties shall bear their own costs of this appeal.

(N P GUPTA),J.